91-1164

Supreme Court, U.S.
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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF NEVADA, NEVADA DEPARTMENT OF TAXATION, and NEVADA TAX COMMISSION,
Petitioners,

v.

SCOTSMAN MANUFACTURING COMPANY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEVADA SUPREME COURT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

A. THE OPINION OF THE NEVADA SUPREME COURT CLEARLY CONFLICTS WITH THE OPINION OF THIS COURT IN UNITED STATES V. NEW MEXICO ON AN IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW.

In its brief in opposition to the petition for writ of certiorari, respondent Scotsman Manufacturing Company (Scotsman) asserts that the petition "does not meet the charge of Sup. Ct. R. 10.1(c)" because the opinion of the Nevada Supreme Court is consistent with the opinion of this Court in United States v. New Mexico, 455 U.S. 720 (1982). However, Scotsman limits its defense of the Nevada Supreme Court's decision to the state court's creation of a dual set of distinct analyses to be applied in sales tax and use tax cases, respectively, for determining whether a state may constitutionally tax a federal contractor's purchase of tangible personal property to be used in an

improvement to realty. See Scotsman's brief in opposition, pp. 2-3. As did the Nevada Supreme Court, Scotsman points to the following passage in New Mexico as authority from this Court approving a disparate analysis in a sales tax case than that to be used in a use tax case:

> Unless the entity as a whole is one of the Government's "constituent parts," then, a tax on its use of property should not be seen as falling on the United States; in that situation the property is being used in furtherance of the contractor's essentially independent commercial enterprise. In the case of a sales tax, however, it is arguable that an entity serving as a federal procurement agent can be so closely associated with the Government, and so lack an independent role in the purchase, as to make the sale - in both the real and a symbolic sense - a sale to the United States, even though the purchasing agent has not otherwise been incorporated into the Government structure. Such was the court's conclusion in Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954). . . .

New Mexico, 455 U.S. at 741-742.

The state disagrees with Scotsman's and the Nevada Supreme Court's interpretation of this passage. What this Court was saying here was that in a case involving an attempt to tax the sale of tangible personal property to a federal contractor, the transaction may be constitutionally immune from state sales tax if, for purposes of the transaction, the federal contractor is serving as a federal procurement agent and is so closely associated with the government, and so lacks an independent role in the purchase, as to make the sale a sale directly to the United States, i.e. the contractor is a constituent part of the government for purposes of the purchase of the tangible personal property.

The citation to Kern-Limerick is significant solely as an example of a case in which the federal contractor was

simply acting as a constituent part of the federal government for purposes of purchasing two tractors, and in New Mexico this Court so restricted its significance. New Mexico, 455 U.S. at 743. Neither the Nevada Supreme Court nor Scotsman make any attempt to explain how, under its contract with REECO, Scotsman was making a sale directly to the Department of Energy, other than referring to the clause passing title to the modular buildings directly to the federal government, and to note that REECO paid Scotsman using federal funds.[1] In New Mexico, this Court

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[1]In an enigmatic footnote, Scotsman cites United States v. Nevada Tax Commission, 291 F. Supp. 530 (D.Nev. 1968), aff'd, 439 F.2d 435 (9th cir. 1971), as if that case had a continuing vitality for purposes of state or federal constitutional law. This case is no longer good law. Nevada Tax Commission predates New Mexico by 14 years, as well as changes in Nevada sales and use tax statutes. See Decision of state district court judge, Appendix B to petition, p. A22; see also NRS 374.345 reprinted in

concluded that neither of these factors clothed the contractor or the vendor with federal constitutional immunity from state sales taxation, particularly where the contractor has a substantial independent role in making the purchase Id. at 744. It cannot be gainsaid that REECO, the general contractor on the construction project for which the modular buildings were purchased, had a substantial independent role in purchasing these buildings from Scotsman.

In the absence of any other factual

Appendix D to petition. Finally, the facts in Nevada Tax Commission are virtually identical to those in New Mexico, and involve the same governmental entity. The district court ruled that because title to the materials purchased by REECO passed immediately to the federal government, and were paid for by federal funds advanced by the government, the sale of materials was a sale to the federal government exempt from sales tax. Nevada Tax Commission, 291 F. Supp. at 532-533. It seems likely that a different result would be reached today, after New Mexico.

similarities this case may have with Kern-Limerick, it is apparent that he Nevada Supreme Court's analysis of the law leading to its conclusion that Scotsman's sale of modular buildings to REECO was a sale to the federal government which the state could not constitutionally tax is in conflict with this Court's opinion in New Mexico, and must be reversed.

B. THE STATE IS NOT SEEKING JUDICIAL REVIEW OF CONTESTED ISSUES OF FACT.

In its final argument in opposition to the petition, Scotsman claims the state's petition improperly seeks this Court's review of the factual findings of the Nevada Supreme Court. This argument is erroneous[2]. As noted in the

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[2]Both cases cited by Scotsman in support of this argument, Missouri, Kansas & Texas Ry. Co. v. Haber, 169 U.S. 613 (1898) and Christman v. Miller, 197 U.S. 313 (1905) are inapposite, since in both cases the petitioner sought to

petition, the material facts in this case - namely, the contract between REECO and Scotsman - are not in dispute. What is in dispute is the legal effect of the contract in relation to the legal issue of whether the state may constitutionally impose its sales tax on Scotsman's sale of modular buildings to REECO.

Both the state district court and the Nevada Supreme Court concluded that summary judgment on these facts was appropriate, albeit reaching opposite conclusions on which party should prevail. The district court, relying on New Mexico, construed the contract as a sale by Scotsman to REECO of tangible personal property which was subject to state sales tax. The Nevada Supreme Court, relying on Kern-Limerick, construed the contract as a sale by

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challenge the trial court's findings of contested facts.

Scotsman directly to the federal government and so exempt from sales tax.

In its petition, the state cited to parts of the contract ignored by the Nevada Supreme Court in support of its argument that the conclusion reached by the state district court was correct as a matter of law. It is well settled that issues of contractual construction, in the absence of ambiguities or other actual complexities, present questions of law. Ellison v. California State Auto Ass'n, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990). The state is asking this Court to do no more than it did in New Mexico, construe the contract between REECO and Scotsman as a sale of tangible personal property on which the state may constitutionally impose and collect its sales tax.

CONCLUSION

Scotsman's arguments in opposition

to the state's petition for writ of certiorari fail to support the opinion of the Nevada Supreme Court as being consistent with the opinions of this Court in either New Mexico or Kern-Limerick. The reasons for Scotsman's failure is apparent. The Nevada Supreme Court's opinion is simply inconsistent with the law on the limits of federal immunity from state taxation as set forth so clearly in New Mexico.

To leave the Nevada Supreme Court's opinion intact will cause serious difficulties for the state in its ability to collect sales tax from vendors selling tangible personal property to federal contractors, and injects confusion and uncertainty again into this area of the law. This Court should grant the

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petition for writ of certiorari, and reverse the Nevada Supreme Court.

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